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July 3, 1997

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JUL 17 1997

Mr. William Caton
Federal Communications Commission
1919 M. Street, N.W.
Room 222
Washington, D.C. 20554

FCC MAIL ROOM

RE: In the Matter of MCI Telecommunication Corporation, Inc.'s
Petition for Declaratory Ruling Regarding Preemption of the Arkansas
Telecommunications Regulatory Reform Act of 1997
CC Docket No. 97-100

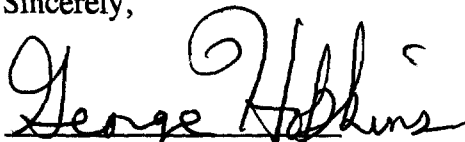
Dear Mr. Caton:

Enclosed for filing, please find an original and thirteen (13) copies of the Comments of the Arkansas Telephone Association regarding the above referenced matter.

Kindly file the Comments and return the extra file-marked copy to me in the enclosed self addressed stamped envelope I am providing for your convenience. I am mailing a copy of this letter and the Comments to Ms. Janice Myles, Common Carrier Bureau, Federal Communications Commission, Room 544, 1919 M Street, N.W., Washington, D.C., 20554; ITS, Inc., 2100 M Street N.W., Suite 140, Washington, D.C., 20037; and all parties of record.

With kindest regards,

Sincerely,


GEORGE HOPKINS
Attorney at Law

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GH/km

enclosure: Comments of the Arkansas Telephone Association

**cc: Ms. Janice Myles
ITS, Inc.
All parties of record**

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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COMMENTS OF THE ARKANSAS
TELEPHONE ASSOCIATION

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SUMMARY

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("Federal Act" or "1996 Act"), provides new directions for the telecommunications industry. The Federal Act provides the mechanism for true competition to occur at each level of the telecommunications industry. Congress did leave barriers to competition in rural areas for the present time. The Federal Act specifically requires Incumbent Local Exchange Carriers ("ILECs") to negotiate in good faith with other potential providers, to interconnect facilities, and to integrate various network elements with all local providers.

Arkansas, in response to the Federal Act, enacted the Arkansas Telecommunications Regulatory Reform Act of 1997 ("Arkansas Act" or "Act 77"). The Arkansas Act became effective on February 4, 1997. The Arkansas Act is a conservative approach to the Federal Act. The approach of Arkansas is demonstrated by the directives within the Arkansas Act for the Arkansas PSC to fulfill the requirements of the Federal Act, to comply with the Federal Act, but to impose no additional state requirements beyond those of the Federal Act.

MCI Telecommunications Corporation, Inc. ("MCI") has filed a petition with the Federal Communications Commission ("Commission") seeking a declaratory ruling from the Commission preempting specific provisions of the Arkansas Act and preempting the Arkansas PSC's authority over interconnections and related matters. MCI contends that preemption is authorized due to 47 U.S.C. § 253, direct conflict, and certain other provisions. MCI objects to the text of the Arkansas Act. MCI has no specific objection to any action taken by the Arkansas PSC. Further, MCI does not object to any inaction by the Arkansas PSC where MCI contends that action should have occurred.

MCI makes a textual challenge to the Arkansas Act. A textual challenge requires the Commission to determine the exact meaning of the language of the text. The Commission does not have the benefit of examining alleged inappropriate action or caused inaction due to the text.

Arkansas courts have rules of construction to assist in providing the interpretation of Arkansas' statutes. The primary rule, to which all other rules must yield, is to give effect to the intent of the legislature. The intent of the legislature is demonstrated throughout the Arkansas Act. The overriding intent is for the Arkansas Act to be read as consistent with and in accordance with the Federal Act. An Arkansas court would read the Arkansas Act side by side with the Federal Act and read the statutes together to meet the legislative intent, if possible. Arkansas courts will go so far as to delete or ignore contradictory clauses to reach that requirement.

Preemption is a very drastic action. Preemption should only occur if the Commission has determined that the Arkansas Act cannot be reconciled with the Federal Act on an issue that absolutely mandates preemption. The specific objections of MCI fail to meet the burden to require preemption by a textual challenge to the Arkansas Act.

MCI's challenges to the specific provisions in the Arkansas Act fail to establish a basis for preemption. MCI's challenge of not requiring resale of promotional packages does not establish a basis for preemption. The enforcement of that provision could occur in a way that is consistent with the Federal Act. MCI challenges the avoided cost language in setting wholesale rates. However, the specific section only permits actions as permitted by the Federal Act. Further, the cost provisions make economic sense.

MCI argues that the Arkansas law does not allow a proper analysis of statements of

generally available terms and conditions. However, the language in 9(i) is broad enough to allow a proper review under the Federal Act.

MCI's challenge to the Arkansas Universal Service Fund does not justify preemption. States may have separate and distinct universal service funds. States may implement policy through a state's universal service fund. The Arkansas Universal Service Fund provisions in the Arkansas Act are consistent with the Federal Act and do not burden the federal universal service fund.

The states have the right to designate only one ETC in rural areas. The Federal Act provides that a state may designate more than one, but does not require such action. The Federal Act does not place the burden of proof on the rural LEC. The Arkansas Act conforms with the Federal Act. Further, the ten (10) considerations challenged by MCI are sub-parts of the allowed review by the Federal Act. The Arkansas Act provides the Arkansas PSC some guidance in what factors to consider when evaluating the allowed criteria.

The Arkansas PSC's authority over interconnections and similar matter should not be preempted. The Arkansas PSC has not taken any action challenged by MCI or ACSI as inconsistent with the Federal Act. The Arkansas PSC has taken action to implement the Federal Act and has not failed to act. The petition of MCI should be denied.

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COMMENTS OF THE
ARKANSAS TELEPHONE ASSOCIATION

The Arkansas Telephone Association ("ATA"),¹ provides these comments in opposition to MCI Telecommunications Corporation, Inc.'s ("MCI") Petition for Expedited Declaratory Ruling Regarding Preemption Of The Arkansas Telecommunications Regulatory Reform Act of 1997 ("Arkansas Act"). The comments of the ATA are submitted pursuant to public notice DA 97-1190 released June 6, 1997 in CC Docket No. 97-100.

On June 3, 1997, MCI filed the petition with the Federal Communications Commission ("Commission"). MCI has requested preemption of various provisions of the Arkansas Act generally related to interconnections and statements of generally available terms and conditions. ("SGATS") Further, MCI has also requested preemption of various provisions of the

¹ The Arkansas Telephone Association is an Arkansas nonprofit corporation with a membership made up primarily of Arkansas telephone companies. The organization seeks to exchange information and work together on common issues to promote quality telecommunications services to the citizens of Arkansas. The ATA files these comments in support of the Arkansas Act on behalf of listed members.

Arkansas Act related to rural telephone companies and other provisions related to universal service. MCI also has petitioned the Commission to issue an order preempting the jurisdiction of the Arkansas PSC regarding interconnections and similar proceedings.

The Arkansas Act should not be preempted. Further, the Arkansas PSC's authority should not be preempted. The Federal Act and the Arkansas Act are consistent. The Arkansas Act provides a state framework for the implementation of the Federal Act.

I. BACKGROUND

A. THE FEDERAL ACT ESTABLISHES A FEDERAL POLICY TO ENCOURAGE COMPETITION

The Federal Act was enacted by Congress in 1996 to provide a national framework to begin new information technologies and services to all Americans by opening all telecommunications markets to competition.² The Federal Act sets broad policy guidelines to nurture competition. The Commission has given the Federal Act broad interpretation to allow sufficient authority to both the Commission and the states to implement the Federal Act's objectives.³

The Federal Act requires significant interplay and effort by both the federal government and state government to implement competition.⁴ The Federal Act allows both the state and federal government significant input to develop competition in each state. The states retain

² Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong. 2d Sess. 113 (1996) (Conference Report).

³ See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996. CC Docket No. 96-98, First Report and Order, para. 4 (1996).

⁴ See 47 U.S.C. § 252 (allows the state PSCs to arbitrate and approve interconnection agreements. The Federal Act has provisions throughout giving various responsibility to state PSCs).

significant control over telecommunications policy.

B. THE ARKANSAS ACT ESTABLISHES AN APPROPRIATE FRAMEWORK FOR COMPETITION.

The Arkansas General Assembly passed Act 77 of 1997, the Arkansas Act, which was signed into law on February 4, 1997. The Arkansas Act provides the Arkansas PSC with sufficient authority to implement the Federal Act. The Arkansas Act requires the Arkansas PSC to act consistently with the Federal Act. The Arkansas Act, in essence, draws a large circle into which all authorized actions under the Federal Act are placed. The Arkansas Act provides the Arkansas PSC authority to perform any action allowed inside that circle but prohibits the exercise of authority outside that broad circle.

The Arkansas Act provides the intent of the General Assembly is to “[p]rovide for a system of regulation of telecommunications services, consistent with the Federal Act, that assists in implementing the national policy of opening the telecommunications market to competition on fair and equal terms, modifies outdated regulation, eliminates unnecessary regulation, and preserves and advances universal service.”⁵ Arkansas is not required to provide the Arkansas PSC supplemental authority beyond that required by the Federal Act. The sole issue is whether the Arkansas Act has provisions inconsistent with the Federal Act to the extent that preemption is mandatory. A careful review of the specific objections by MCI establishes preemption is not warranted.

C. THE OBJECTION IS TO TEXT, NOT ACTION

It should be noted that neither ACSI nor MCI have objected to any particular action taken

⁵ Arkansas Act § 2

by the Arkansas PSC in implementing the Federal Act.⁶ Further, neither ACSI nor MCI have objected to any specific failure to act by the Arkansas PSC in an area where action might be required. The Arkansas Act requires significant Arkansas PSC rule-making to implement its provisions.⁷ Many of those rules are yet to be established by the Arkansas PSC.

The challenges by ACSI and MCI are facial challenges to the language of the Arkansas Act itself. The Commission should be aware that such facial challenges require a cautious approach when the Commission attempts to establish specific meaning to provisions of an act passed by the Arkansas General Assembly and signed into law by its Governor.⁸

At a minimum, the Commission should look closely at the rules of statutory construction used by Arkansas courts prior to interpreting the language in the Arkansas Act. The Arkansas Courts would almost certainly evaluate the meaning of the Arkansas Act after reviewing it side by side with the Federal Act's requirements.⁹ The Arkansas courts' rules on statutory construction establish that language may be ignored or deleted in order to comply with the General Assembly's overriding intent. The overriding intent of the Arkansas Act is for it to be read in accordance with and consistent to the Federal Act.

Before the Commission takes the drastic step of preempting a state law, the Commission should very carefully determine whether its interpretation is the same interpretation that an

⁶ See ACSI Petition, MCI Petition.

⁷ See Arkansas Act §§ 11(d), 4(e).

⁸ The Commission must interpret the precise meaning of the text without benefit of state action based upon such language. What a statute appears to require and actual requirements may be significantly different.

⁹ The Arkansas Act regularly refers to the Federal Act. The court should determine meaning based upon review of one to the other; See also City of Fort Smith v. Tate 311 Ark. 405, 844 S.W.2d 356 (1993).

Arkansas court would apply. Unless certain of the interpretation of the Arkansas Act that a Arkansas court would provide, the Commission should not preempt the Arkansas Act without actual action or inaction by the Arkansas PSC that clearly violates the Federal Act.

ARGUMENT

The ATA will examine the issue of preemption. The drastic nature of preemption mandates use of preemption only if preemption is necessary.¹⁰ The ATA will provide insight as to how Arkansas statutes should be interpreted.

The ATA will review the specific issues that MCI makes concerning the Arkansas Act. Further, the ATA will examine the issue whether the Arkansas PSC's authority over interconnections and similar matters should be preempted. The petition of MCI does not justify preemption.

A. PREEMPTION IS NOT FAVORED UNDER THE LAW.

Preemption of state law by a federal agency should not be taken lightly. The standards for preemption are strict.¹¹ Preemption may occur only in very specific instances. The Supreme Court has provided a detailed discussion of the limited types of preemption in Louisiana Public Service Commission v. FCC.¹² Congress has the ability to specifically preempt state action over issues by direct prohibition. The Federal Act does not prohibit state regulation of telecommunications.¹³ In fact, the Federal Act contemplates significant state regulation in

¹⁰ See Gregory v. Ashcroft, 501 U.S.452 (1991).

¹¹ See Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985).

¹² Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986).

¹³ See generally Federal Act.

telecommunications and expands the states' responsibilities in certain areas.¹⁴ The Federal Act did not preempt the states' ability to regulate the telecommunications industry.

A second type of preemption is where Congress has created a regulatory scheme so complete and comprehensive to require the conclusion that Congress left no supplemental authority for state action in the area.¹⁵ The Federal Act leaves the states significant supplemental regulatory authority over the telecommunications industry.

A third type of federal preemption occurs when a state law is in direct conflict with federal law.¹⁶ The real issue in MCI's brief will center upon whether the Arkansas Act is in direct conflict with the Federal Act in particular areas. The states and the Commission both have significant decision-making authority under the Federal Act.

1. Any Preemption Depends On The Meaning And Interpretation Of The Arkansas Act.

The issue of whether the Arkansas Act directly conflicts with the Federal Act in certain areas focuses not only on the language within the Arkansas Act but the ultimate interpretation of the Arkansas Act by Arkansas Courts and the interpretation of the Federal Act by the Federal Courts. Until both are reasonably certain, then the drastic step of preemption invites hesitation.

A method to interpret the Arkansas Act is to determine how the Arkansas Act is implemented by the Arkansas PSC and Arkansas courts. Neither ACSI nor MCI object to any specific action by the Arkansas PSC. Further, neither ACSI nor MCI object to any failure of the

¹⁴ See Federal Act (States maintain many traditional regulatory roles and now designate ETCs and also oversee interconnections).

¹⁵ See Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986).

¹⁶ Id.

Arkansas PSC to act in any particular matter. No showing has been made that the Arkansas PSC has failed to properly implement the requirements of the Federal Act. For instance, both petitions find fault with the Arkansas Act's provisions related to interconnection agreements. However, the Arkansas PSC has approved at least seven interconnection agreements since the passage of the Arkansas Act.¹⁷ No objection is made to the specific orders entered by the Arkansas PSC or its actions related to those specific orders.

2. The Commission Should Review Arkansas Statutory Construction Rules

The Arkansas Act has not been interpreted by an Arkansas court at this time. Arkansas courts have very detailed requirements on interpretation of statutes. A review of relevant statutory construction rules in Arkansas will provide compelling reasons why the Arkansas Act has no direct conflict with the Federal Act to justify preemption. The Arkansas PSC does not have the final word on what the Arkansas Act means. The Arkansas courts have the right to ultimately decide the meaning of language within the Arkansas Act.

MCI states that the Federal Act provides specific statutory authority for preemption of state law and regulation.¹⁸ However, in Section 253 (b), Congress provided that nothing in § 253 (§ 253 includes preemption rights) "shall affect the ability of a state to impose . . . requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights to consumers."¹⁹ If

¹⁷ See Arkansas PSC, 97-003-U, Order #2; Arkansas PSC, Docket No. 97-027-U Order #2; Arkansas PSC, Docket No. 97-029-U Order #2; Arkansas PSC, Docket No. 97-036-U Order #2; Arkansas PSC, Docket No. 97-064-U Order #2; Arkansas PSC, Docket # 97-119-U, Order #2; Arkansas PSC, Docket No. 97-155-U Order #3.

¹⁸ MCI Petition pp. 3-5.

¹⁹ 47 U.S.C. § 253 (b).

a state is properly setting policy for the purposes in 253 (b), then preemption is not allowed under § 253 (a).

B. MCI MISREADS SECTION 253

Section 253 (a) of the Federal Act provides generally that states may not “prohibit” any entity from providing any telecommunications service.²⁰ Section 253 (a) also provides that state law may not have the “effect of prohibiting” any entity from providing any telecommunications service.²¹ Prohibit is defined as “to forbid by law; to prevent; not synonymous with ‘regulate’.”²² MCI appears to substitute the term “barrier to entry” for “effect of prohibiting”.²³ These terms are not equivalent. A barrier may make entry harder, but it does not necessarily forbid or prevent entry. MCI uses antitrust cases and terms, such as barrier to entry, that are not a part of § 253 (a). Section 253 (a) has two prohibitions. The first prohibition is a state law may not “directly prohibit” (forbid) an entity from providing a telecommunications service. The second prohibition is a state may not, by less direct means, do the same thing (prohibit an entity from providing any telecommunications service).

Almost any regulation tends to act as a “barrier to entry.” Any regulation tends to require time, human resources, and commitment of financial resources. If “barrier to entry” is the standard, then many of the rules of the Arkansas PSC and most states’ regulatory rules would be caught in MCI’s net.

²⁰ See 47 U.S.C § 253 (a).

²¹ Id.

²² Black’s Law Dictionary (5th ed. 1979).

²³ See MCI Petition p.5.

Arkansas maintains significant regulatory control over telecommunications providers, specifically LECs. LECs must comply with the General Service Rules of the Arkansas PSC.²⁴ LECs must comply with the Special Rules-Telecommunications of the Arkansas PSC.²⁵ These two sets of rules alone require telephone companies to file numerous documents with the Arkansas PSC, maintain numerous records, prepare information for customers, prepare specific forms for use by customers, and provide extremely detailed information on telephone bills. Further, LECs must provide various customer services such as extended due date plans, delayed payment agreements, medical emergency plans, elderly and handicapped plans, and extended absence plans. LECs must also meet quality of service standards and comply with numerous other requirements that constitute significant regulatory burdens and barriers to entry.

The numerous requirements in the rules constitute a barrier to entry by a CLEC. It makes entry much harder. It is unlikely all these burdens "have the effect of prohibiting" any CLEC from providing any telecommunications service. If a CLEC desires to provide local service in Arkansas, then it must comply with numerous rules and regulations that make the start-up costs and overhead of the CLEC significant whether customers exist or not.

However, §253 (b) allows such regulation, even if it has the effect of prohibiting a potential CLEC from providing a telecommunications service. The issue is not whether regulatory burdens and barriers exist. MCI has not established that the provisions of the Arkansas Act will even make it harder for a CLEC to provide telecommunications service. Further, the issue is whether regulation has the effect of prohibiting (not just making harder) the ability of any

²⁴ See Arkansas PSC's General Service Rules.

²⁵ See Arkansas PSC's Special Rules-Telecommunications.

entity to provide any telecommunications service and the action is taken without the authority granted through the major exceptions provided by §253 (b).

C. THE ARKANSAS ACT IS CONSISTENT WITH FEDERAL LAW

The Arkansas Act was written to be consistent with the Federal Act. Numerous references are made throughout the Arkansas Act for it to be interpreted and read in a manner to conform with the Federal Act.²⁶ The proper interpretation of the Arkansas Act should begin with the rules that Arkansas Courts employ to determine meaning. Arkansas courts have rules of construction that allow the Arkansas Act to be interpreted as consistent with the Federal Act. The Commission, at a minimum, should employ the same careful review that an Arkansas court would use to determine meaning.

In Arkansas, the most basic rule of statutory construction, to which **all other interpretive guides must yield**,²⁷ is the rule to **give effect to the intent of the legislature**.²⁸ Legislation must be read to give effect to legislative intent. A primary method of determining legislative intent is to look to the language of the whole statute or act.²⁹ The best way to determine the legislative intent is to consider the entire act as a whole.³⁰ In order to give effect to legislative intent, the Arkansas courts' duty, so far as practical, is to reconcile the different provisions of a

²⁶ At least ten (10) references in the Arkansas Act are made to establish compliance with the Federal Act. Terms such as the following are used: consistent with, in accordance with, except as prohibited by, as permitted by, to the extent permitted by, except to the extent required by, go beyond those requirements imposed by, ensure it is consistent with and complementary to.

²⁷ Graham v. Forrest City Housing Authority, 304 Ark. 632, 803 S.W.2d.923, 924 (1991).

²⁸ Id.

²⁹ Thomas v. Cornell, 316 Ark. 366, 872 S.W.2d. 370 (1994).

³⁰ Cozad v. State, 303 Ark. 137, 792 S.W.2d. 606 (1990).

statute to make them consistent, harmonious, and sensible.³¹ If the words used by the legislature are sufficiently flexible, then an act should be construed to effectuate the intention of the legislature. Also, if a literal application of a statute would lead to absurd consequences, then a literal application should be rejected in favor of an alternative interpretation which gives effect to the statute's purpose.³² An interpretation that allows preemption would not give effect to the Arkansas Act's purpose.

In determining legislative intent, in order to construe a statute, **reason and spirit**³³ take precedence over the **letter of the law**,³⁴ especially where strict adherence to the wording of the statute would result in absurdity or injustice or **defeat the plain purpose of the law**.³⁵ In construing a statute, every effort must be made to give effect to the legislative purpose in enacting the statute. A strict and literal meaning of any section of the statute ought not to prevail when it is opposed to the intention of the legislature.³⁶

One section in an act should not be read separately to determine legislative intent. For instance, in determining legislative intent, each section of a statute is to be read in light of every other section and the object and purpose of a statute are to be considered.³⁷ Although a statute

³¹ Woodcock v. First Commercial Bank, 284 Ark. 490, 683 S.W.2d 605 (1985).

³² Henson v. Fleet Mortgage Co., 319 Ark. 491, 892 S.W.2d 250 (1995).

³³ Williams v. City of Pine Bluff, 284 Ark. 551, ___, 683 S.W.2d 923, 925 (1985).

³⁴ Id.

³⁵ Id.

³⁶ Garrett v. Cline, 257 Ark. 829, 520 S.W.2d 281 (1975).

³⁷ Chizm v. Phelps, 228 Ark. 936, 311 S.W.2d 297 (1958).

should be construed to give meaning and effect to every word therein, if possible, **unnecessary or contradictory clauses in acts will be deleted and disregarded** in order to give effect to clear legislative intent.³⁸ Further, statutes relating to the same subject should be read in a harmonious manner if possible.³⁹ All statutes on the same subject are in pari materia and must be construed together and made to stand if capable of being reconciled.⁴⁰ If a conflict appears to exist between statutes on the same subject (Federal Act and Arkansas Act), then the conflict is resolved by giving effect to legislative intent.⁴¹

It is not enough to argue that the Arkansas PSC has interpreted the Arkansas Act in a particular way. Any construction rule concerning administrative review must yield to legislative intent. The rule to which all others must yield is to give effect to legislative intent. Any alleged inconsistency between the Federal Act and the Arkansas Act must be resolved by referral to legislative intent.⁴² Due to the significant step that preemption requires, (to rescind action taken by the lawfully elected members of the Arkansas General Assembly and the Governor of Arkansas) the Commission should ensure that the Arkansas Act is incapable of an interpretation that is not in conflict with the Federal Act. **What has the Arkansas PSC done which is in violation of the Federal Act? Where is proof the Arkansas PSC will ever take action that**

³⁸ City of Fort Smith v. Tate, 38 Ark. App. 172, 832 S.W.2d 262 (1992), aff'd, 311 Ark. 405, 844 S.W.2d 356 (1993).

³⁹ Gritts v. State, 315 Ark. 1, 864 S.W.2d 859 (1993).

⁴⁰ City of Fort Smith v. Tate, 311 Ark. 405, ___, 844 S.W.2d 356, 359 (1993).

⁴¹ See Williams v. City of Pine Bluff, 284 Ark. 551, 683 S.W.2d 923 (1985).

⁴² See Id.

will violate the Federal Act?

Ark. Code Ann. §23-2-423 provides for judicial review of Arkansas PSC orders. Specifically, Ark. Code Ann. §23-2-423 (b) (4) provides for a Court of Appeals' review of Arkansas PSC orders for violation of any right of the petitioner under the laws and Constitution of the United States or the State of Arkansas.⁴³ In reviewing the Arkansas Act, the Arkansas courts would place it beside the Federal Act and give the Arkansas Act meaning and effect derived from the combined whole.⁴⁴ The Arkansas Court of Appeals could then use all the statutory construction tools outlined above to reconcile the Arkansas Act to the Federal Act. The Commission should follow the same procedure.

The overriding legislative intent in the Arkansas Act is to act consistently with the Federal Act.⁴⁵ The Arkansas Act has one overriding theme throughout. That theme is the Arkansas Act should be read to be consistent with the Federal Act.⁴⁶ In fact, Section 2 of the Arkansas Act actually states the intent of the General Assembly. The first statement in the intent clause is that the purpose of the Act is to "[p]rovide for a system of regulation of telecommunications services, consistent with the Federal Act[.]"⁴⁷ Any alleged inconsistency requires a review to reconcile the Federal Act and Arkansas Act based upon legislative intent.⁴⁸

⁴³ See Ark. Code Ann. § 23-2-423 (b)(4) (Supp. 1995).

⁴⁴ See Hercules Inc. V. Pledger, 319 Ark. 702, 894 S.W.2d 576 (1995).

⁴⁵ See Arkansas Act and fn. 26 herein.

⁴⁶ The Arkansas Act has at least ten (10) references placed throughout that states the Arkansas Act is subject to the limitations of the Federal Act or is to be read in accordance and consistent with the Federal Act.

⁴⁷ Arkansas Act § 2 (1).

⁴⁸ See Williams v. City Pine Bluff, 284 Ark. 551, 683 S.W.2d 923 (1985).

Throughout the Arkansas Act, references are made to the Federal Act. The references indicate that the Federal Act requirements are to be complied with. From the first section, after the name of the Act, to the emergency clause at the end, the legislature states its intention is to “revise its existing regulatory regime for the telecommunications industry to ensure that it is consistent with and complementary to the Federal Telecommunications Act of 1996.”⁴⁹

The Commission should not superimpose its own interpretation of the Arkansas Act without attempting to apply the rules of statutory construction that an Arkansas court would apply to the Arkansas Act. Therefore, the Commission should look to the intent of the Arkansas General Assembly by reading the entire Act. Further, the Commission should apply the most basic rule of statutory construction, to which all other rules must yield, which is to give effect to the intent of the legislature.⁵⁰

The Commission should interpret the statute, if possible, so as to enable the entire statute and all parts to be effective.⁵¹ If the interpretation provided by the Commission would allow preemption, then Commission should attempt, if possible, to provide an alternative interpretation that will prevent the statute from being subject to preemption. If the Commission applies a literal application of the language of the Arkansas Act that would lead to absurd consequences (peremption), then the literal application should be rejected in favor of an alternative interpretation which gives effect to the statute’s purpose.⁵² The Commission should not use a rule

⁴⁹ See Arkansas Act §16 (emergency clause).

⁵⁰ See Graham v. Forrest City Housing Authority, 304 Ark. 632, 803 S.W.2d 923 (1991).

⁵¹ See Town of Wrightville v. Walton, 255 Ark. 523, 501 S.W.2d 241 (1973).

⁵² See Henson v. Fleet Mortgage Co., 319 Ark. 491, 892 S.W.2d 250 (1995).

of strict construction which, if used, would defeat the obvious intent of the Arkansas General Assembly.⁵³ If the Commission should find any clauses that it considers contradictory, then the Commission should treat as deleted and disregard any contradictory clauses in the Arkansas Act in order to give effect to clear legislative intent.⁵⁴ It is important to remember the petitions do not object to Arkansas PSC actions, but rather focus only on text.

D. MCI'S SPECIFIC OBJECTIONS DO NOT JUSTIFY PREEMPTION.

1. Section 9(d) Of The Arkansas Does Not Violate The Federal Act.

MCI objects to the text of Arkansas Act § 9(d). Section 9 (d) is set forth below in its entirety:

Except to the extent required by the Federal Act and this Act, the Commission shall not require an incumbent local exchange carrier to negotiate resale of its retail telecommunications services, to provide interconnection, or to sell unbundled network elements to a competing local exchange carrier for the purpose of allowing such competing local exchange carrier to compete with the incumbent local exchange carrier in the provision of basic local exchange service. Promotional prices, service packages, trial offerings, or temporary discounts offered by the local exchange carrier to its end-user customers, are not required to be available for resale (emphasis added).⁵⁵

MCI states that § 9 (d) of the Arkansas Act denies competing carriers the ability to obtain “[p]romotional pricing, service packages, trial offers or temporary discounts offered by the local exchange carrier to its end-user customers” for resale.⁵⁶ Does the phrase in § 9(d), “except to the

⁵³ See Henderson V. Russell, 267 Ark. 140, 589 S.W. 2d 565 (1979).

⁵⁴ See City of Fort Smith v. Tate, 38 Ark. App. 172, 832 S.W.2d 262 (1992). aff'd, 311 Ark. 405, 844 S.W.2d 356 (1993).

⁵⁵ Arkansas Act § 9(d).

⁵⁶ MCI Petition, p.7.

extent required by the Federal Act in this act,” modify all the language in §9 (d)? If the Commission would otherwise find the language subject to preemption, then Arkansas statutory construction rules may require such as an interpretation. If a different interpretation made the provisions in §9 (d) subject to preemption, then an Arkansas court must give the statute such a construction, if possible, that will enable the statute and all parts thereof to be effective.⁵⁷

Another potential interpretation of that language also exists. For instance, Arkansas courts and the Commission may interpret “ promotional prices, service packages, trial offerings or temporary discounts” to include only those which comply with any time limitations provided by federal law. For instance, promotional prices could be defined as prices that are in effect only a certain period of time that is consistent with federal requirements.

2. Section 9(g) Does Not Violate The Federal Act.

MCI objects to the text of the Arkansas Act § 9(g) on establishing wholesale rates. A substantial issue exists as to whether the Commission or the states may establish policy related to setting costs and rates. Ignoring for the moment this major issue which is undecided, even if the Commission and not the states set costs factors and discount rates, then the Arkansas Act may be interpreted as consistent with the Federal Act. The overriding intention of the legislature, as demonstrated by examining the Arkansas Act as a whole, is to be consistent with federal law. Section 9 (g) contains references to actions “ as permitted by the Federal Act” and “ to the extent permitted by the Federal Act” within the specific section objected to by MCI.⁵⁸ If the Commission finds one interpretation of § 9(g) inconsistent with the Federal Act to the extent that

⁵⁷ Town of Wrightsville v. Walton, 255 Ark. 523, 501 S.W.2d 241 (1973).

⁵⁸ Arkansas Act § 9(g).

preemption is mandated, then the Commission should interpret the provisions of §9(g) to be effective only "to the extent allowed by Federal Act".⁵⁹

The net avoided cost language in § 9 (g), even if interpreted as MCI requests, makes economic sense. The appropriate wholesale rate should be established after determining the costs which are avoided and any costs which are created. Either the Commission could use Arkansas statutory construction to interpret the Arkansas Act in a way it is not preempted or find that even if the Arkansas Act is interpreted as MCI suggests it should be, the Arkansas Act still does not violate federal law.

3. Section 9(i) Does Not Violate The Federal Act.

MCI also attacks §9 (i) of the Arkansas Act. § 9 (i) is set forth below as follows:

The Commission shall approve any negotiated interconnection agreement or statement of generally available terms filed pursuant to the Federal Act unless it is shown by clear and convincing evidence that the agreement or statement does not meet the minimum requirements of Section 251 of the Federal Act (47 USC 251). In no event shall the Commission impose any interconnection requirements that go beyond those requirements imposed by the Federal Act or any interconnection regulations or standards promulgated under the Federal Act.

The first issues is proper statutory interpretation of § 9(i). It is the duty of an Arkansas court to give effect to the intent of the General Assembly, even though the true intention, though obvious, has not been expressed by the language employed when the language is given its literal meaning.⁶⁰ MCI argues the Arkansas Act does not allow the full review required by the Federal

⁵⁹ Id.

⁶⁰ Steele v. Murphy, 279 Ark. 235, 650 S.W. 2d 573 (1983).